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No. 90-1420

In the Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA A. MCKINNEY; ROBERT BUDJAC; ROSELYN BUDJAC, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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This case presents an important issue concerning the interpretation of the RICO pre-trial restraint provisions: *viz.*, whether the Government may restrain *prior to trial* non-tainted assets legitimately owned by a third party. The Government minimizes the far-reaching implications of the Fourth Circuit's misapplication of that statute by asserting that McKinney's assets belong to Billman, the RICO defendant, and are restrainable as *his* substitute assets. The Government's brief misstates the record and relies on innuendo and material inaccuracies to support the Fourth Circuit's decision. The undisputed finding of the district court is that the assets are *not* Billman's.

Even if they were, their restraint contradicts the unambiguous language of the statute. Absent from the Government's brief is any argument to the contrary.

Three essential predicates underlie the Fourth Circuit's decision; one is factual, the other two are statutory. The factual assumption -- *viz.*, that Petitioners' funds once belonged to Billman and are now *his* substitute assets -- is false. The Fourth Circuit's restraint of Petitioners' funds also rests on two assumptions that squarely conflict with the plain and unambiguous language of the statute: *viz.*, that (1) the pre-trial restraint provision (Subsection (d)(1)(A)) and (2) the relation-back doctrine (Subsection (c)) apply to legitimate assets belonging to third parties. The latter assumption is critical to the Government's attempt to defend the Fourth Circuit's conclusion that the funds are *Billman's* substitute assets despite its conclusion that the funds belong to Petitioners.

1. The Government seriously misstates the record. The district court held a full evidentiary hearing to determine the propriety of a restraint. The Government acknowledged that there is not "a shred of evidence" connecting McKinney's funds to the alleged racketeering enterprise. It could not establish that Billman ever owned the funds. Indeed, the district court did not even find that Billman was either the source of, or transferred, the funds to McKinney.[1] Rather, the

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[1] The Government contends that "the district court's ruling rested on the implicit finding that Billman was the source of the funds." *Opposition* at 11. The Government does not provide a record citation in support of this contention. Nor can it. This contention is simply false. The district court's analysis was straightforward: *viz.*, the funds are not derived from the alleged racketeering enterprise and are not substitute assets of Billman. Those conclusions are consistent with Billman either being the source or not being the source of the

(continued...)

district court found that the funds now legitimately belong to McKinney. The Fourth Circuit accepted these findings. That is the record before the Court and the Government cannot -- as it has done here -- elect not to be bound by that record.

For example, to explain away the obvious due process problems presented by an indefinite (and potentially permanent) restraint of Petitioners' legitimate assets, the Government asserts that "[McKinney] *presently sustains* [Billman] as a fugitive by forwarding messages left for him on an answering device." *Opposition* at 17 (emphasis added). By this statement, the Government suggests that McKinney should not be heard to complain about the Government's inability to apprehend Billman and ultimately resolve the issues underlying the restraint of her assets. In essence, the Government appears to justify the restraint as a form of punishment.

This assertion is *false*. The indictment -- handed up on December 1, 1989 -- does not allege that McKinney ever sustained Billman as a fugitive. At the February 1990 evidentiary hearing, the Government neither alleged, nor attempted to prove, that McKinney had any sort of continuing (or incidental) contact with Billman.[2] The only evidence of record concerning any alleged contacts between Billman and McKinney relates to wiretaps of McKinney's phone in April and May of 1989.

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[1](...continued)
funds. The district court's holding, therefore, does not entail -- as a matter of logical inference -- that Billman was the source of the funds.

[2]If anything, discussions between McKinney and the U.S. Attorney's office between August and December of 1989 indicated that the Government was aware that McKinney had no contacts with Billman.

Those calls occurred nearly *two years ago*. For the Government now to assert that McKinney "*presently sustains* [Billman] as a fugitive" is outrageous and manifestly unfair.

Counsel for the Government relies upon the Fourth Circuit's conclusion in making its inaccurate statements about McKinney's current conduct. That is no excuse. The Fourth Circuit's conclusion was wrong. "[A]n appellate advocate has the luxury of time (and review by more experienced advocates). We do not expect to see misstatements of this character in briefs." *United States v. Green*, 786 F.2d 247, 254 (7th Cir. 1986) (Easterbrook, J.) Many of the Government's other statements about McKinney distract from the merits of the issues presented.[3] This misstatement does more. It purports to address the merits. As such, that statement misleads the Court on a material issue. "The principal coin of the United States Attorney [and counsel for the Government] is credibility. Some of that coin has been wasted in this case." *Id.*

Moreover, the Government claims that the district court "ruled that 18 U.S.C. 1963 does not authorize a

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[3]For example, the Government baldly asserts that "McKinney was not an innocent third party engaged in a legitimate business transaction with Billman." *Opposition* at 12. First, the district court did not find that McKinney was engaged in *any* transaction with Billman. Apparently, the Government intends for such statements to reflect poorly on McKinney's character. Similar misstatements pervade the Fourth Circuit's decision. For example, in denying McKinney's Sixth Amendment claim, the Fourth Circuit stated -- without factual support -- that McKinney had no legitimate entitlement to the funds. *Pet.App.* at 11a. The Fourth Circuit even suggested -- contrary to the undisputed findings of the district court -- that the hearing justified the inference that the funds transferred to McKinney were part of the racketeering proceeds. *Pet.App.* at 7a.

pretrial injunction restraining assets of a RICO defendant transferred to a third party." *Opposition* at 6. To the contrary, the district court ruled that the assets belong to McKinney and are *not* substitute assets of Billman. *Pet.App.* at 27a. The Government's mischaracterization of the district court's holding is important and obscures a central issue before the Court. The district court found that the funds "belong" to McKinney. The Government did not challenge that finding on appeal, and the Fourth Circuit affirmed it. Nevertheless, the Fourth Circuit held, and the Government now contends, that the funds are substitute assets *of Billman*.

The Government presumes that matters were adjudicated that in fact were never alleged by the Government or litigated by the parties. For example, the Government states that "McKinney presented insufficient evidence to show that she qualifies as a bona fide purchaser for value without cause to believe that the substitute assets in her hands [transferred by Billman] were subject to forfeiture."[4] *Opposition* at 12. Again, this statement incorrectly assumes that McKinney's assets belong to Billman and she is merely holding them for him. Equally important, it assumes that the district court conducted a bona fide purchaser hearing. The record unequivocally establishes that it did not.

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[4]The Government uncritically relies on the Fourth Circuit's conclusion in making this assertion. We discuss *supra* that such reliance is not an excuse for a misstatement. Indeed, if any inference can be drawn from the district court's finding that the funds belong to McKinney, it is that the transfer was legitimate. "The evidence of record fails to establish that [McKinney] was merely holding funds which in reality still belonged to Billman. In fact, the audio tape of a phone conversation * * * suggests quite forcefully that the money was [McKinney's] to do with as she pleased." *Pet.App.* at 27a.

The Government compounds this misstatement by asserting that "Section 1963(c) provides that any forfeitable property transferred to a third party shall be forfeited unless the transferee establishes that he was a bona fide purchaser for value of the property." *Opposition* at 9. To the contrary, Subsection (c) does only one thing: *viz.*, passes title to *racketeering proceeds* to the Government at the time of the offense. It does not apply to untainted assets such as McKinney's funds. Consequently, a bona fide purchaser hearing would have been inappropriate under the circumstances of this case and the district court did not conduct such a hearing.

On a petition for certiorari, the briefs and appendices of the parties constitute the "record" before the Court. As a result, the Court is unable to confirm independently the factual assertions of the parties. Instead, the Court must rely upon the representations of the attorneys who appear before it. In that regard, the Court has traditionally given considerable weight -- especially when a dispute arises -- to the representations of counsel for the Government. With that reliance comes the responsibility fastidiously to assure that record statements are above reproach. The Government has failed to discharge that responsibility here.

Perhaps that failure arises from the Government's haste to convince the Court that McKinney is not the type of person it should protect. In any event, our system of justice rests upon a simple -- but critically important -- principle: the rule of law, not of men. That principle cannot be honored if the Government does not confine itself to the record developed in the court of first instance. In advocating vigorously on behalf of the people, counsel for the Government should also not forget that their actions can have a devastating impact upon an individual's liberty and reputation.

2. The Government's misstatements of the record minimizes the detrimental impact of the Fourth Circuit's decision on legitimate commercial transactions. The Government flatly asserts that "there is no merit in [McKinney's] contention * * * that the decision below will have a substantial and detrimental impact on legitimate commercial transactions" because she received "forfeitable racketeering proceeds." *Opposition* at 11. It concludes that "McKinney was not an innocent third party." *Id.* at 12. Again, these assertion rest on the incorrect assumption that McKinney's assets are tainted and that she received them in a non-legitimate transaction.

Setting aside its mischaracterization of the record, the Government concedes that "the pretrial restraint of a RICO defendant's substitute assets may in some cases disrupt legitimate business transactions." *Opposition* at 12. "The legitimacy of a third party transaction * * * turns on whether the transferee had reason to believe that the transferred assets were forfeitable * * *." *Id.* This explanation conflates the issue of whether a transaction is ultimately *voidable* with that of whether it can be *challenged*. For business purposes, the prospect of litigating the propriety of a transaction is sufficient to impede or bar it. The Government admits that any *transaction involving a RICO defendant's untainted assets can give rise to a bona fide purchaser hearing under the unlimited restraint* authority permitted by the Fourth Circuit's decision. *Id.* The Government's assertion that the Fourth Circuit's decision will not have a far-reaching detrimental effect on legitimate business transactions is wishful thinking at best.

3. The Government does not squarely defend the Fourth Circuit's restraint of McKinney's legitimate assets. In their initial brief, Petitioners establish that the Fourth Circuit's decision contradicts the plain and

unambiguous language of the RICO restraint provisions. *Petition* at 4-5 & 12-16. The Government's argument to the contrary is half-hearted. The Government contends instead that substitute assets become subject to forfeiture and pre-trial restraint at the time that the racketeering proceeds are taken beyond the jurisdiction of the court. *Opposition* at 9. Rather than providing a uniform approach to restraint issues, the Government's contention creates a confusing distinction between types of substitute assets. That is, under the Government's theory, some substitute assets are subject to pre-trial restraint and others are not.

The plain terms of the RICO forfeiture provisions speak decidedly against such a distinction. Under those provisions, substitute assets are subject to forfeiture only *after* conviction, the return of a verdict of forfeiture, and an ascertainment of the availability of racketeering proceeds to satisfy that judgment. Furthermore, the Government articulates this position for the first time in argument to the Court. The Government has not sought to restrain any of Billman's assets in the United States. Nor did it attempt at the evidentiary hearing to establish that none of the alleged racketeering proceeds remained in the United States. Consequently, Petitioners had no opportunity to challenge the validity of the critical factual predicate underlying this argument.

Neither the Fourth Circuit nor the Government appear to recognize the confusion resulting from their interpretation of the RICO restraint and forfeiture provisions. By expanding Subsection (m) to include assets legitimately belonging to a third party and placing such assets within the scope of both the relation-back provision of Subsection (c) and the pre-trial restraint provision of Subsection (d)(1)(A), the resulting statutory framework vests title to non-tainted funds in three persons simultaneously. For example, in this case, the

funds belong to McKinney, the Government, and Billman. It is unreasonable to assume that Congress intended such a result.

4. The Government does not dispel the serious constitutional problems raised by the Fourth Circuit's decision.[5] The Government does not deny that the Fourth Circuit's decision extends the reach of the pre-trial restraint permitted in *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) from racketeering proceeds to non-tainted assets. Rather, the Government argues that the indictment in this case establishes probable cause that *Billman* received racketeering proceeds. *Opposition* at 15. Petitioners do not dispute this, nor do they claim that Billman's tainted assets may not be restrained. The critical issue here is whether a restraint of *McKinney's* non-tainted assets violates her Sixth Amendment right to counsel. The Government also appears to seek comfort in the allegation in the indictment that McKinney helped place some portion of Billman's racketeering proceeds beyond the jurisdiction of the court. That allegation -- whether true or false --

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[5]In their initial brief, Petitioners also demonstrated that the Fourth Circuit ignored the statutory limitations and safeguards other courts have observed in applying the RICO forfeiture provisions. The Government's discussion is non-responsive. For example, in analyzing *Regan*, the Government states that "the court in *Regan* concluded that the district court could, as an alternative, restrain substitute assets of the individual defendants . . . ." *Opposition* at 13. This statement assumes that McKinney's assets are *substitute assets*, which they are not. In addition, it overlooks that the Second Circuit was discussing the restraint of such assets still in the hands of the RICO defendants. Both assumptions are contrary to the operative facts presented in this case. Finally, the Government leaves unaddressed the Second Circuit's determination that the *only* justification for a restraint of a third-party's untainted assets would be the preservation of racketeering proceeds, a matter not at issue here.

is not relevant to the Sixth Amendment analysis in *Caplin & Drysdale*. That allegation certainly does not convert McKinney's untainted assets into racketeering proceeds. "The forfeiture statute does not prevent a defendant who has non-forfeitable assets from retaining any attorney of his choosing." *Caplin & Drysdale*, 109 S. Ct. at 2652.

In their initial brief, Petitioners also establish that the Fourth Circuit's indefinite (and potentially permanent) restraint of McKinney's legitimate assets violates due process. The Government limits its response to the false allegation -- discussed above at 3-5 -- that McKinney is "presently sustaining" Billman as a fugitive. In addition, the Government appears to suggest that the Fourth Circuit's erroneous conclusion that McKinney's assets are *Billman's* substitute assets somehow constitutes a probable cause determination and satisfies due process. *Opposition* at 16. We are at a loss to understand how this suggestion is relevant to the due process analysis. In any event, it contradicts the undisputed finding that the funds "belong" to McKinney.

Conclusion

If the Court denies review, the Government will assuredly argue that the Fourth Circuit's decision stands for the very broad restraint authority it now suggests is not present. The plain and unambiguous language of the RICO pre-trial restraint provisions do not authorize the restraint of McKinney's funds. Those funds are legitimate, belong to her, and bear no connection to criminal activity. Those funds, and the constitutional safeguards embodied in the carefully-defined terms of the RICO restraint provisions, provide the only means she -- or any other defendant -- has to mount a defense and protect her liberty. For the foregoing reasons and those set forth in our initial brief, the Court should grant the petition for certiorari.

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